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Supreme Court, U.S.
FILED
OCT 30 1984
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-115

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARIO LOPEZ, et al., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# RESPONDENTS' BRIEF IN OPPOSITION

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# RESPONDENTS' BRIEF IN OPPOSITION

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The respondents, Mario Lopez, et al., respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 725 F.2d 1489.

## INTRODUCTION

The Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, et. seq., (hereinafter "1984 legislation"), signed by the President on October 9, 1984, disposes of the only question presented by the Secretary's petition for a writ of certiorari: whether certain members of the class certified by the district court should be barred from receiving interim relief as a result of having failed to comply with the sixty-day limitation period of Section 205(g) of the Social Security Act (42 U.S.C. § 405(g)). See Petition, 29. The 1984 legislation specifically directs that interim relief be afforded to all

members of classes certified on or before September 19, 1984, challenging their terminations on the grounds that their conditions had not improved since previous findings of disability. Since all Respondents plainly meet this requirement, the narrow issue on which the Secretary sought review has been rendered moot.*

I.

## IN LIGHT OF THE SECRETARY'S PURPOSEFUL DISREGARD OF JUDICIAL PRECEDENT, CONGRESS ENACTED THE SOCIAL SECURITY DISABILITY BENEFITS REFORM ACT OF 1984 AND AUTHORIZED RELIEF FOR CLASS MEMBERS WHETHER OR NOT THEY HAD COMPLIED WITH THE PROCEDURAL REQUISITES OF SECTION 405(g).

### A. Background of this Litigation.

The Ninth Circuit Court of Appeals issued two decisions holding that the Social Security Administration could not lawfully terminate disability benefits to persons whom it had previously found to be disabled without making an initial showing that their conditions had improved: Finnegan v. Mathews, 641 F.2d 1340 (9th Cir. 1981) and Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982).[1]

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*The underlying case, however, is by no means moot. Infra, n. 5.

[1]This "medical improvement standard" has been adopted over the Secretary's objections by eleven circuits. See, Iida v. Heckler, 705 F.2d 353, 365 (9th Cir. 1983); Perry v. Heckler, 722 F.2d 461, 464 (9th Cir. 1983); Murray v. Heckler, 722 F.2d 499, 501 (9th Cir. 1983); Miranda v. Secretary of HEW, 514 F.2d 996, 998 (1st Cir. 1975); DeLeon v. Secretary, 734 F.2d 930, 937 (2nd Cir. 1984); Parente v. Heckler, 735 F.2d 743, 744 (2nd Cir. 1984); Kuzmin v. Schweiker, 714 F.2d 1233, 1237 (3rd Cir. 1983) ("the presumption of a continuing disability... imposes on the Secretary... the burden of going forward with evidence to

(Footnote Continued)

The Secretary sought review of neither of those decisions. Instead, she issued "rulings of nonacquiescence" in which she directed the agency and administrative law judges to refuse to follow the law as set forth in these unappealed circuit court precedents. See, Appendix to Petition for Writ of Certiorari, pp. 87a - 91a.

This action was filed alleging that the Secretary's policy of nonacquiescence was unconstitutional and seeking suitable injunctive relief against that policy on behalf of those unlawfully injured or threatened by it. The district court agreed and issued a preliminary injunction enjoining the Secretary from implementing the nonacquiescence rulings directed at Patti and Finnegan. Paragraphs 4(a) and 4(b) of of Order, Appendix p. 85a. The Secretary did not request a stay of, or review as to, these portions of the district court's order. Petition, pp. 11, 29.

To arrest the ongoing irreparable harm resulting from unlawful disability terminations, the district court further ordered that the Secretary notify class members that they could apply for reinstatement and interim benefits if they believed their medical condition had not improved. The Secretary was required to review such claimants under the Ninth Circuit's medical improvement standard and, in the

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meet or rebut the presumption."); Dotson v. Schweiker, 719 F.2d 80, 82 (4th Cir. 1983); Rivas v. Weinberger, 475 F.2d 255, 258 (5th Cir. 1973); Hall v. Celebreeze, 314 F.2d 686, 688 (6th Cir. 1963); Hayes v. Secretary, 656 F.2d 204, 206 (6th Cir. 1981); Haynes v. Secretary of HHS, 734 F.2d 284, 288 (6th Cir. 1984); Cassidy v. Schweiker, 663 F.2d 745, 749 (7th Cir. 1981); Lee v. Heckler, 737 F.2d 768 (8th Cir. 1984); Rush v. Heckler, 738 F.2d 909, 915 (8th Cir. 1984); Weber v. Harris, 640 F.2d 176, 178 (8th Cir. 1981); Byron v. Heckler, No. 84-1046 (10th Cir. Aug. 10, 1984); Van Natter v. Secretary, No. 79-1439 (10th Cir. January 8, 1981) (Not for Routine Publication) [cited as controlling in the class action decision of Trujillo v. Heckler, 569 F. Supp. 631, 635 (D. Colorado 1983)]; Simpson v. Schweiker, 691 F.2d 966, 969 (11th Cir. 1982); and Freeman v. Heckler, No. 83-7277 (11th Cir. 1984).

interim, to reinstate their disability benefits prospectively. Appendix 86a.[2] On appeal, the Ninth Circuit Court of Appeals substantially affirmed, although it limited the scope of the preliminary relief. Lopez v. Heckler, 725 F. 2d 1489 (9th Cir. 1984).

The Secretary has petitioned this Court to grant certiorari and limit the preliminary injunction only to those class members who received adverse administrative decisions less than sixty days before this action was filed, or had administrative actions seeking review of their terminations still pending within that sixty day period. Petition at 29.

The Secretary's petition envisioned enforcing the sixty-day limitations period as a jurisdictional bar (a) notwithstanding this court's rulings in Weinberger v. Salfi, 422 U.S. 749, 763-64 (1975), and Mathews v. Eldridge, 429 U.S. 319, 328 n. 9 (1976), that the sixty-day period is not jurisdictional; (b) notwithstanding the fact that this suit sought judicial review not of individual benefit terminations, but of the nonacquiescence policy as such;[3]

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[2]It is noteworthy that the order did not include retroactive reinstatement as of the date of unlawful termination, but only from the date of the class member's application for reinstatement.

[3]Unless the class seeking such review includes the claimants for whom the sixty-day time limit has run, it is strongly arguable that no enforceable order could be entered invalidating the policy of nonacquiescence as such. For any individual district court plaintiff, the argument may be made that nonacquiescence is no longer a continuing harm, since it is a policy which taints the administrative process, but not review in the district court, which must follow circuit court precedent. An individual or class invoking such precedent in the district court will be met either by individual acquiescence or else by good faith relitigation of such precedent under this Court's ruling in United States v. Mendoza, 104 S.Ct. 568 (1984), holding that the government is not bound by the doctrine of non-mutual collateral estoppel. In either event, the Secretary would remain free to continue her policy of nonacquiescence as to all other cases, since no injunction would have been entered
(Footnote Continued)

and (c) notwithstanding the fact that the individuals deprived of benefits under the challenged nonacquiescc policy had never been notified, personally or through a official publication, of the existence of that policy.

B. The 1984 Social Security Disability Reform Legislation.

Parallel to the developments in this suit, Congre has been deeply concerned with the hardship caused by the administration of the disability program. Senator Dole described the 1984 legislation as "representing the culmin tion of more than 2 years of congressional deliberation." 130 Cong. Rec. S 11452 (daily ed. Sept. 19, 1984). Noting that over the past three years, nearly half a million persons had been terminated from the disability rolls, whil of those who appealed, "some 60 percent had benefits reinstated," Senator Dole concluded that it was obvious that "people were removed from the rolls who should not have been." Id. at 11453. Representative Rostenkowski stated, in urging approval of the Reform Act, that:

> [T]he situation that this bill corrects is only too well known to every Member of this Chamber:

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(Footnote Continued)
against nonacquiescence itself. It is only by including in the class persons whose relief is dependent upon a challenge to nonacquiescence as such that the federal judiciary may effectively review the due process and separation-of-powers issues that wholesale, circuit-wide nonacquiescence presents. The only persons who clearly fit that description in this case are those as to whom the sixty-day limit has passed. It was those plaintiffs who were peculiarly and demonstrably injured by the Secretary's nonacquiescence policy -- a policy of which they received no nctification whatever, and which lulled them into allowing the sixty-day limit to pass. Thus, for this Court to adopt the government's position, either directly or by implication, would have resulted not only in the denial of relief for certain class members, but also in banishment from the federal courts of all claims against nonacquiescence.

> Hundreds of thousands of beneficiaries have lost their benefits, thousands of appeals are clogging our Federal court dockets, 29 States have refused to follow the Administration's instructions for termination of benefits, and 200 Federal courts all over the country have threatened the Secretary of Health and Human Services with contempt of court citations for refusing to pay benefits when ordered. 130 Congress. Rec. H 9834 (daily ed. Sept. 19, 1984).

Responding to these concerns, Congress has authorized -- indeed mandated -- the relief plaintiffs were provisionally awarded below. In an effort to rectify the Secretary's defiance of judicial precedent, and to ease the disruption caused by her unlawful policies, Congress fashioned a medical improvement standard for determining disability which is similar to the one announced by every Court of Appeals which has considered the issue. Under the new law, a recipient whose disability benefits case is reviewed may be determined not to be entitled to disability benefits only if that finding is supported by: (1) substantial evidence that there has been medical improvement in the individual's impairment and that he is now able to engage in substantial gainful activity; (2) new medical evidence and a new assessment of the individual's residual functional capacity demonstrating that although the condition has not improved medically, he has undergone vocational therapy or is the beneficiary of advances in medical or vocational therapy or technology and is now able to engage in substantial gainful activity; (3) substantial evidence based on new or improved diagnostic techniques demonstrating that the individual's impairment is not as disabling as it previously was considered to be and that he

is now able to engage in substantial gainful activity; or (4) substantial evidence that the prior determination of disability was in error. [Section 2 of the 1984 Act, Public Law 98-460]

Congress provided that this standard shall apply to cases pending administrative review, and individual cases pending judicial review. [Section 2(d)(2)] Most significantly, Congress directed that the new standard also be applied to any unnamed member of a pending class action relating to medical improvement if the class was certified on or before September 19, 1984, and if the individual class members' benefits had been terminated on the ground that his impairment had ceased or was not disabling. [Section 2(d)(3)] Congress directed that the court shall remand such recipients' cases to the Secretary who then must notify the individual class member by certified mail that he may request that his case be reviewed under the new medical improvement standard. Class members are entitled to request payment of interim benefits pending the initial redetermination. [Section 2(e)][4] These uniquely devised provisions dispose of the Secretary's petition for certiorari because they permit unnamed class members to have their cases reviewed under the new statutory standards, and to receive interim payments, whether or not they have

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[4]The Joint Explanatory Statement of the Committee of Conference for H.R. 3755 described this provision as follows:

> The medical improvement standard in these amendments will only apply to:
>
> ...
>
> (v) unnamed plaintiffs in class action suits certified as of September 19, 1984, as follows: the cases shall be remanded to the Secretary; the Secretary shall notify all plaintiffs via certified mail that they have 120 days from the date of receiving the notice to file a request with the Secretary for review under these amendments.

Conference Report at 27, 130 Cong. Rec. H. 9828 (daily ed. Sept. 19, 1984).

exhausted their administrative remedies or satisfied the time limits of Section 405(g). See remarks of Sen. Dole, 130 Cong. Rec. S 11454 (daily ed. Sept. 19, 1984).

II.

BECAUSE CONGRESS SPECIFICALLY PROVIDED THAT MEMBERS OF THE CLASS CERTIFIED BELOW OBTAIN INTERIM RELIEF AND REVIEW UNDER THE MEDICAL IMPROVEMENT STANDARD, THUS ELIMINATING THE ONLY BASIS FOR THE SECRETARY'S PETITION FOR CERTIORARI, THE PETITION SHOULD BE DENIED.

The Secretary has petitioned this Court to review only that aspect of the Ninth Circuit's decision authorizing interim relief to class members whose claims had become, in the Secretary's opinion, administratively final because of failure to seek review within sixty days of a notice of termination or subsequent administrative determination. See Petition at 29. Since Congress has spoken on this question, directing that members of classes certified on or before September 19, 1984, receive relief substantially similar to that ordered by the district court in this action, the petition for certiorari should be denied.[5]

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[5]However, while the "jurisdictional" grounds urged by the government in this Court (and which comprised the sole basis for appeal in the Ninth Circuit) have been disposed of in the 1984 legislation, the underlying case has not been mooted. See Sanks v. Georgia, 401 U.S. 144, 151 (1971)(appeal dismissed because intervening statutory change, while not necessarily rendering case moot, makes case inappropriate for review). A number of substantial issues remain in this case which should first be addressed by the courts below. The only matter pending before this Court is review of a preliminary injunction. No final judgment has been entered, and no final resolution of substantive matters left untouched by Congress has occurred. The legitimacy of the Secretary's nonacquiescence policy, an

(Footnote Continued)

Even after full argument -- on occasion even after decision -- this Court has dismissed a petition for certiorari as improvidently granted because of an intervening change in the governing statute. Triangle Improvement Council v. Ritchie, 402 U.S. 497, 91 S.Ct. 1650 (1971); Rice v. Sioux City Memorial Park Cemetary, 349 U.S. 70, 75 S.Ct. 614 (1955); Cook v. Hudson, 429 U.S. 165, 97 S.Ct. 543 (1976). Instantly, where a petition for certiorari has not yet been granted, and an intervening statute directly addresses the only issue raised, denial of the petition is appropriate.

If the Court should consider granting the petition solely for the purpose of vacating the decision of the Ninth Circuit -- a step Respondents consider unnecessary -- the appropriate mandate would be to remand to the Ninth Circuit with directions to proceed in light of the intervening statute. The suggestion of the Secretary in Heckler v. Kuehner, No. 83-1593 (supplemental brief for petitioners in Heckler v. Kuehner, p. 10), that the court remand directly to the Secretary, would be wholly inappropriate in the case at bar, where substantial issues respecting the Secretary's nonacquiescence policy and implementation of the 1984 legislation remain. See, n. 5, supra.

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(Footnote Continued)
issue presented here, but not in Heckler v. Kuehner, No. 83-1593, is pending below. Significant issues must also be addressed with respect to the court's oversight of the Secretary's implementation of the new legislation to class members. For instance, the court will have to resolve disputes on whether an individual falls within the terms of the class definition. Moreover, the Secretary no longer has current addresses for many class members terminated years ago, and the district court will have to approve procedures which appropriately protect the right to notice for these individuals. Issues remain as well with respect to those class members for whom this Court denied the Secretary's application for a stay and who may be entitled to relief beyond that recently authorized by Congress.

To say that the cases of various class members "must be remanded by the appropriate court to the Secretary," (Ibid., emphasis added), is not to say that this Court is "the appropriate court" to discharge any such mission after suitable consideration of how the statute impinges on the class action brought below or how the enactment of that statute affects the award of preliminary relief affirmed by the circuit court in this case. There is simply no basis in the action taken by Congress, in the complex legislative history of that action, or in the past practices of this Court, for the Solicitor General's extraordinary suggestion that the Supreme Court should itself undertake in the first instance the potentially time-consuming task of sorting out the tangled issues, both theoretical and practical, posed by the Secretary's treatment of various class members and by her unusual conduct of this still unfinished litigation in the lower courts. Nor is there any conceivable basis for the even more remarkable notion that this Court might properly short-circuit all of these complexities by ignoring such issues and itself directing a remand of the entire case to the Secretary herself.[6]

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[6]Should the Secretary request such mandate, Respondents assume they will be granted an opportunity to address the issue more fully. Kuehner and the case at bar differ in many respects, and they should not be inadvertently treated as a single case.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

DATED: October 30, 1984

Respectfully submitted,

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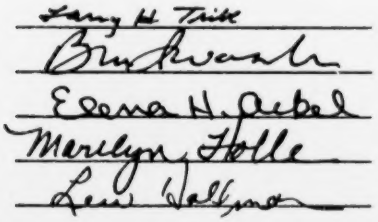

CERTIFICATE OF SERVICE PURSUANT TO

SUPREME COURT RULE 28.5(b)

I am a member of the Bar of the United States Supreme Court, am one of the attorneys representing the individual plaintiffs below and the respondents herein in Docket No. 84-115, and I have filed a notice of appearance in this matter in connection with the respondents' opposition to petitioner's application for stay pending filing of petition for certiorari. I served the respondent herein by placing the following in a United States mail box, with next-day (express mail) first-class postage prepaid, the following documents:

One copy of the application for leave to proceed in forma pauperis with supporting affidavits and declarations

Three copies of respondents' brief in opposition to the petition for certiorari

addressed to counsel of record as follows

The Hon. Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

on this 29th day of October, 1984. I swear under penalty of perjury that the foregoing is true and correct. Executed this 29th day of October, 1984, in the County of Los Angeles, State of California.

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